

### **REMARKS**

Claims 1, 7-8, and 13-14 are now pending.

The Applicants herein limit the claims now pending to fluvastatin calcium, *per se*, and cancel all process limitation claims without prejudice to expedite the prosecution of this case.

The Applicants respectfully highlight to the Examiner that subject matter of the claims now pending is limited to the calcium salt species of fluvastatin ((3R\*,5S\*)-(E)-7-[3-(4-fluorophenyl)-1-(1-methyl-ethyl)-1H-indol-2-yl]-3,5-dihydroxy-6-heptenoic acid), the optically active crystalline form, pharmaceutical compositions, and methods of use.

#### **35 USC § 112.1, Written Description**

The Applicants respectfully submit that since the subject matter of the claims now pending is narrowly limited to the calcium salt species of fluvastatin ((3R\*,5S\*)-(E)-7-[3-(4-fluorophenyl)-1-(1-methyl-ethyl)-1H-indol-2-yl]-3,5-dihydroxy-6-heptenoic acid), the optically active crystalline form, pharmaceutical compositions, and methods of use, one of ordinary skill in the art at the time of the invention can reasonably conclude that the inventor had *possession* of the claimed invention.<sup>1</sup>

The Applicants respectfully request that the Examiner withdraw the rejection in view of the amendments to the claims.

#### **35 USC § 103, Obviousness**

The Applicants respectfully acknowledge the Examiners position that one of ordinary skill in the art may seek to experiment with calcium, *inter alia*, from a laundry list of reagents identified by Ekwuribe and others to create a myriad of different fluvastatin salts. However, nowhere in the prior art is fluvastatin calcium, *per se*, disclosed, contemplated, or suggested.

Nevertheless, *even if* it could be argued that one of ordinary skill would otherwise be motivated to try a calcium salt, for example, the Applicants respectfully submit, as the Federal

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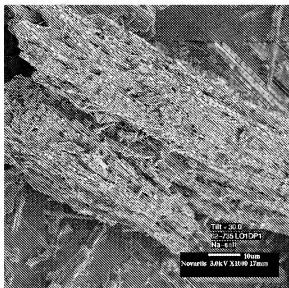
<sup>1</sup> To satisfy the written description requirement, a patent specification must describe the claimed invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor had possession of the claimed invention. The Applicants need not teach, however, what is otherwise known to those of ordinary skill in the art at the time of the invention. MPEP 2163.

Circuit has repeatedly emphasized,<sup>2</sup> unexpected results, i.e., the statistically and practically significant hygroscopicity exhibited by the optically active crystalline calcium salt of fluvastatin described and claimed herein, in fact rebuts any *prima facie* showing of obviousness. The optically active crystalline calcium salt of fluvastatin described and claimed herein was clearly compared in the previously rule 132 Declaration to the sodium salt of fluvastatin, isolated as fibrous crystals (i.e., crystalline form to crystalline form) to demonstrated the unexpected results of the present invention (direct hygroscopic comparison of the two distinct crystalline forms):

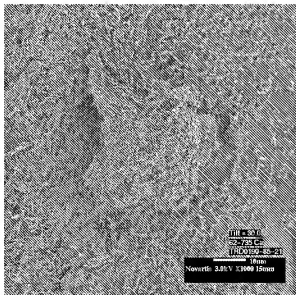
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<sup>2</sup> See, e.g., Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc., 520 F.3d 1358, 1365 (Fed. Cir. 2008).

The sodium salt of fluvastatin, isolated as fibrous crystals:



was compared in the recent 132 Declaration of record to the calcium salt which crystallizes as small white needles:



Van Der Schaaf merely states generally that crystalline forms of sodium fluvastatin are less hygroscopic than amorphous forms. Van Der Schaaf, however, does not disclose any specific hygroscopic property. The instant crystalline calcium salt was found to absorb almost 10 times less (indeed statistically and practically significant) the amount of moisture from the atmosphere as the crystalline sodium salt. Since the instantly claimed calcium salt is novel, and the compound is shown to exhibit 1/10 the hygroscopicity of the fibrous crystal sodium salt of fluvastatin, the calcium crystal, *per se*, cannot be obvious as a matter of law.

The Applicants respectfully request that the Examiner withdraw the rejection.

The Applicants respectfully submit that Claims 1, 7-8, and 13-14 are in condition for allowance. Early action toward this end is courteously solicited. The Examiner is kindly encouraged to telephone the undersigned in order to expedite any detail of the prosecution. The Commissioner is authorized to charge any deficiency or credit any overpayment to Deposit Account No. 02-2556.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Patrick H. Higgins', with a long horizontal flourish extending to the right.

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Patrick H. Higgins  
Attorney for the Applicants  
Registration No. 39,709  
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USPTO Customer No. 3705

**Eckert Seamans Cherin & Mellott, LLC**  
U.S. Steel Tower  
600 Grant Street, 44th Floor  
Pittsburgh, PA  
215.851.8533 (voice)  
215.851.8383 (fax)